FILE COPY

Office Supreme Court
FILED
JAN 17 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 611.

THE IVANHOE BUILDING & LOAN ASSOCIATION OF NEWARK, N. J.

Petitioner,

—against—

THOMAS A. ORR, Trustee of EASTERN SASH & DOOR COMPANY, Bankrupt.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT, THOMAS A. ORR, Trustee of EASTERN SASH & DOOR COMPANY, Bankrupt, IN OPPOSITION.

CHARLES E. HENDRICKSON,
Attorney for Respondent.

SAUL NEMSER,
Counsel for Respondent.

CHARLES E. HENDRICKSON,
SYDNEY L. JACOBS,
On the Brief.

A. J. DOAN & SON, JERSEY CITY

INDEX.

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. The Supreme Court of the United States should not review the decision of the Circuit Court of Appeals	3
II. The Court of Bankruptcy was justified in reducing the Petitioner's Claim	6
CONCLUSION	12

Cases Cited.

American Bonding Co. v. *United States*, 233 Fed. 364	10
Central Trust Co. v. *Chicago Auditorium Ass'n*, 240 U. S. 581, 36 Sup. Ct. Rep. 412	5
Chapman v. *Bowen*, 207 U. S. 89	5
Federal Title & Mortgage Guaranty Co. v. *Lowenstein*, 113 N. J. Eq. 200, 166 Atlantic 538	7, 10
Hiscock v. *Varick*, 206 U. S. 28	8
In the Matter of Dix, 186 Fed. 582	9
In the Matter of Graves, 20 Am. B. R. 818	8
In the Matter of Teitenberg, 15 Am. B. R. (N. S.) 580	9
In Re McAusland, 235 Fed. 173	10
Winter's Appeal, 174 Fed. 556	9

Other Authorities Cited.

	PAGE
Section 240 (a) of the Judicial Code, as amended by Act of Congress, February 13, 1925, a. 229, 43 Stat. 936	5
Bankruptcy Act of 1898	
Section 24 (a)	3
Section 25 (b)	3
Section 25 (a)	4
Section 63 (b)	9
Section 68 (a)	11
Act of Congress of February 13, 1925, c. 229, 43 Stat. 941	4
59 Corpus Juris 102	10
50 Corpus Juris 74	10

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 611.

THE IVANHOE BUILDING & LOAN ASSOCIATION OF NEWARK, N. J.,

Petitioner,

—against—

THOMAS A. ORR, Trustee of EASTERN SASH & DOOR COMPANY, Bankrupt,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT, THOMAS A. ORR, TRUSTEE OF EASTERN SASH & DOOR COMPANY, BANKRUPT, IN OPPOSITION.

Opinions Below.

The opinion of the Circuit Court of Appeals is printed (R. 20-24) but is not yet reported. The opinion of the United States District Court for the District of New Jersey is printed (R. 8-10). The order of the Referee in Bankruptcy is printed (R. 6-7).

Jurisdiction.

The decree of the Circuit Court of Appeals was entered October 3, 1934 (R. 24). The Petitioner attempts to invoke

the jurisdiction of this Court under the authority of Section 240 (a) of the Judicial Code, as amended by the Act of Congress, February 13, 1925, c. 229, 43 Stat. 936.

In reply to the petition for a writ of certiorari, the respondent respectfully submits to this honorable court that neither the facts nor the state of the decisions applying to the facts with respect to the Bankruptcy Act and such law as pertains to it, constitute any reason whatsoever to reconsider on certiorari, the decision of the Circuit Court of Appeals for the Third Circuit. This is an ordinary case arising under the Bankruptcy Act, the decision of which, by the circuit Court of Appeals for the Third Circuit, is neither in conflict with the decisions of other circuit courts of appeal nor in conflict with the weight of authority on the subject. There being no ground for a technical appeal or writ of error, there is also, because of the above reasons, no ground for a writ of certiorari.

The respondent also respectfully insists that under the interpretation of the Statutes of Congress now subsisting, this Honorable Court has been, through the amendment of the Bankruptcy Act, deprived by Congress of jurisdiction to hear on certiorari, this subsisting litigation already decided by the Circuit Court of Appeals for the Third Circuit.

Questions Presented.

1. Whether the Supreme Court of the United States should exercise jurisdiction to review the decision of the Circuit Court of Appeals in affirming the order of the United States District Court for the District of New Jersey reducing the claim of the petitioner.

2. Whether a Court of Bankruptcy may refuse the claimant any right to share or may reduce the amount upon which he may take contribution in dividends on the ground that claimant has obtained satisfaction in whole or in part out of the property pledged as collateral security by some third person especially where the bankrupt is not primarily liable for the indebtedness.

Statement.

The facts are not in dispute and are contained in "Stipulation of Facts" (R. 2-5) and are substantially set forth in the Petition (pp. 2-3).

Summary of Argument.

1. THE SUPREME COURT OF THE UNITED STATES SHOULD NOT REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS.

2. THE COURT OF BANKRUPTCY WAS JUSTIFIED IN REDUCING THE PETITIONER'S CLAIM.

ARGUMENT.

I.

The Supreme Court of the United States should not review the decision of the Circuit Court of Appeals.

Prior to 1925 the appellate jurisdiction of the Supreme Court of the United States in Bankruptcy matters was governed by sections 24 (a) and 25 (b) of the Bankruptcy Act. Section 24 (a) is as follows:

> The Supreme Court of the United States, the Circuit Courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the Supreme Courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the Courts of Bankruptcy from which they have appellate jurisdiction in other cases.

Section 25 (b) is as follows:

> b. From any final decision of a Court of Appeals allowing or rejecting a claim under this Act, an appeal

may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States.

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

Both Sections 24 (a) and 25 (b) of the Bankruptcy Act have been repealed by the Act of Congress of February 13, 1925, c. 229, 43 Stat. 941, so far as they regulate the mode of review by the Supreme Court in the proceedings, controversies and cases therein named.

The right of appeal in Bankruptcy matters is now governed by Section 25 (a) of the Bankruptcy Act.

Section 25 (a) is as follows:

a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the Courts of Bankruptcy to the Circuit Courts of Appeal of the United States and the Court of Appeals of the District of Columbia and to the Supreme Courts of the Territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate Court in term or vacation, as the case may be.

Prior to 1925, the Supreme Court of the United States would not have entertained jurisdiction to review the decision in the instant case for the reason that no federal ques-

tion is presented which would sustain a writ of error to a state court. *Chapman* v. *Bowen*, 207 U. S. 89, *Central Trust Co.* v. *Chicago Auditorium Ass'n.*, 240 U. S. 581, 36 Sup. Ct. Rep. 412.

In the case of *Chapman* v. *Bowen, supra*, the Court held:

> "A decision of a Circuit Court of Appeals that a creditor is entitled to have his claim allowed against the bankrupt estate of an individual partner, as well as against the estate of the bankrupt partnership, which proceeds upon a well settled principle of general law broad enough to sustain it without reference to the provisions of the Bankruptcy Act of July 1st, 1898, (30 Stat. at L. 544, c. 541 U. S. C. Title 11, sec. 1) is not reviewable in the federal Supreme Court under section 25 b of that act as involving a question which would sustain a writ of error to a state court."

In the case of *Central Trust Co.* v. *Chicago Auditorium Ass'n., Supra*, the Court held:

> "A decision of a Circuit Court of Appeals that a claim against a bankrupt estate for damages growing out of the anticipatory breach of an executory contract while allowable as a provable debt for the term during which that court thought that the contract was mutually obligatory should not be allowed beyond that period, is not reviewable in the Federal Supreme Court under the Bankrupt Act of July 1st, 1898 (30 Stat. at L. 553, c. 541 U. S. C. Title 11, Sec. 48) Sec. 25 b 1 as presenting a federal question which would sustain a writ of error to a state court.

The respondent respectfully submits that the review by the Supreme Court contemplated by Section 240 (a) of the Judicial Code as amended by the Act of Congress, February 13, 1925, c. 229, 43 Stat. 936, does not apply to matters in Bankruptcy.

Section 240 (a) of the Judicial Code is as follows:

> In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of

Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by Certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

II.

The court of bankruptcy was justified in reducing the petitioner's claim.

On July 21, 1927, Abraham Portnoff et als. executed to the petitioner a bond in the sum of $23,000. conditioned for the payment of $11,500. and interest thereon at the rate of 6% per annum. To secure the payment of the bond, the obligors executed to the petitioner a mortgage covering premises known as 386 Leslie Street, Newark, N. J.

On October 7, 1927, the obligors conveyed the premises to the bankrupt, which deed was recorded on October 11, 1927. In that deed, the bankrupt expressly assumed and agreed to pay the mortgage. By a deed dated October 11, 1927, the bankrupt conveyed the said premises to one, Clara Manasevit, now Clara Yavne. In that deed, the grantee expressly assumed and agreed to pay the mortgage.

On April 2, 1932, the petitioner filed a bill to foreclose the mortgage and on June 20, 1932, a final decree was entered. On August 9, 1932, the premises were sold by the Sheriff of Essex County to the petitioner for the sum of $100.

On April 23, 1932, Eastern Sash & Door Company was adjudged a bankrupt. Petitioner filed claim in the sum of $10,739.94, as an unsecured claim, which represents the difference between the amount of the final decree, interest and costs and the amount received at the sheriff's sale.

Respondent claims that the value of the property should be set off from the amount of the petitioner's claim. Petitioner has received payment of its claim to the extent of $9,000. which is the admitted value of the premises in question.

In the case of *Federal Title & Mortgage Guaranty Co.* v. *Lowenstein,* 113 N. J. Eq. 200, 166 Atlantic 538, Vice Chancellor Berry said:

> "The present sale being in effect a strict foreclosure, the ancient practice of appraising the property for the purpose of fixing the deficiency, originally adapted for the protection of the mortgagee, should now be invoked for the protection of the mortgagor. 'Equality is Equity.' It would be unjust to permit the mortgagee to extort double satisfaction from the mortgagor, and it would be equally unjust to compel the mortgagee to accept inadequate security in satisfaction of his debt. But it is considered no injustice to the mortgagee when a judicial sale of mortgaged premises accomplishes no more than a strict foreclosure to revert to the English practice referred to and require the mortgagee to accept the security at its fair value and give him the right to proceed on the bond for the deficiency. In this manner both parties are protected and exact justice is accomplished. The same result has been reached in this country upon a foreclosure by entry and possession. Armory v. Fairbanks, 3 Mass. 562 (1793); West Chambers, 25 Mass. 138, 3 Am. Dec. 98. In Armory v. Fairbanks, it was held that after foreclosure the estate may be valued and the mortgagee may then be deemed to have received payment pro tanto.
>
> One of the maxims lying at the very foundation of equitable jurisprudence is that 'equity will not suffer a wrong without a remedy.'
>
> The mortgagee will not be permitted to retain the estate which will, in effect, become absolute in him upon confirmation of the foreclosure sale and also recover the debt which is the consideration of that estate by an action on the bond, except and until he credits upon that bond the fair value of the mortgaged premises so acquired by him."

The state law governing such situations is binding upon the federal courts. *Hiscock* v. *Varick*, 206 U. S. 28.

The case of *In the Matter of Graves*, 20 Am. B. R. 818, is practically identical with the instant case. In that case a note was made by Vail Light & Lumber Co. to the order of Graves. Graves indorsed this note to the claimant. As security for the note the Vail Company gave Graves a bond and mortgage which Graves assigned to the claimant. Graves then filed a petition in Bankruptcy. The claimant foreclosed the mortgage and then filed claim for the deficiency against the Estate of Graves in bankruptcy. The Court held as follows:

> "Sec. 57H providing for the valuation of non-preferential securities held by secured creditors does not apply where the securities were not the property of the bankrupt, and where he is endorser upon a corporation note and the proof of claim sets forth that the note is secured by a mortgage on both the real and personal property of the maker. The Bankruptcy Court has no jurisdiction over the mortgaged property except to ascertain its value and to see to its proper application in payment of the note when presented for allowance against the bankrupt's estate.
>
> The Court of Bankruptcy in the exercise of its equitable powers may refuse the claimant any right to share or may reduce the amount upon which he may take contribution in dividends, on the ground that he has obtained satisfaction, in whole or in part, out of the property pledged as collateral security by some third person.
>
> Mr. Clement was entitled to prove his claim for the amount due thereon, but having foreclosed on the property of another and obtained full and complete possession thereto, he should have dividends only on the balance after deducting the value of the mortgaged property which he has received from the corporation which is his principal debtor.
>
> The cause is referred back to the Referee to find the balance due on the said note after deducing the value of the property covered by said mortgage and taken under said decree."

In the Matter of Teitenberg, 15 Am. B. R. (N. S.) 580.

"Where a claim on a deficiency judgment on a foreclosure action has been entered, the Bankruptcy Court may inquire into the judgment and where the claimant bought in the property for an inadequate amount the claim will be allowed for the amount equitably due."

In the Matter of Dix, 186 Fed. 582.

Where the holder of mortgages given by a bankrupt foreclosed and bid in the property for a nominal sum, there being no competing bid, on his filing a claim against the bankrupt estate for the balance of his debt, the actual value of the property may be inquired into and his claim will be allowed only for the amount equitably due.

In the case of *Winter's Appeal,* 174 Fed. 556, decided by the Circuit Court of Appeals for the Third Circuit, the title to the property was in the bankrupt and the claimant admitted that the property, purchased by him at the foreclosure sale, which secured the bond on which the claim was based, was worth more than the amount of the mortgage and costs. Consequently the debt was fully paid and the claim was disallowed as paid by the foreclosure.

This matter can be viewed in a different way. At the time of the adjudication herein this petitioner had an unliquidated claim which could not be filed until it was liquidated in accordance with the provisions of the Bankruptcy Act. Section 63 b of the Bankruptcy Act provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

The usual method of liquidating a claim such as the one here in question would be a suit in the Court of Chancery of New Jersey against the corporation now bankrupt, based upon the equitable rights which arise in such situations.

Because of the intervention of bankruptcy the creditor's right to proceed in the State Court is lost and instead the creditor must file a claim on the bond in the Federal Court and there liquidate it. *In re McAusland,* 235 Fed. 173.

The Trustee's application to expunge or reduce the petitioner's claim was, in essence, a liquidation of the amount due and carries with it an application to have it liquidated in accordance with the authority given under section 63 b of the Bankruptcy Act.

If we proceed to liquidate the claim in question in accordance with the rule enunciated by the New Jersey Court of Chancery in the case of *Federal Title & Mortgage Guaranty Co.* v. *Lowenstein, supra,* the value of the property which has been admitted to be the sum of $9,000. must be set off against the amount of the petitioner's claim leaving a balance of $1,739.94 for which sum the claim was allowed as a general unsecured claim.

This matter can be viewed in another light. The relationship which the bankrupt bore was that of surety for the payment of the debt owed by Clara Yavne as principal.

In 50 C. J. 74 it is said:

> "The liability of a surety is co-extensive with that of a principal."

The filing of the claim by the creditor is similar to a suit on the bond and under the case of *Federal Title & Mortgage Guaranty Co.* v. *Lowenstein, supra,* the liability of the principal in such suit would be the difference between the deficiency and the fair market value of the property.

The principal in such suit could set up the defense of partial payment. In the case of *American Bonding Co.* v. *United States,* 233 Fed. 364, it was held that a surety can set up the same defense that a principal could.

In 50 C. J. 102 it is said:

> "Partial payment does not discharge the surety completely. It is, however, a discharge of his liability to the extent of the payment made, as where the surety

> is discharged pro tanto by payment from the principal to the creditor, or by payments of the proceeds from security received by the creditor."

This matter can be viewed in still another way. When the mortgage was foreclosed the obligation of the bankrupt to pay the mortgage still existed but the petitioner, mortgagee, purchased the property for a nominal sum. While the obligation of the bankrupt to pay the mortgage still remained, the petitioner had gotten possession of the security and in enforcing this obligation against the bankrupt, the petitioner must reduce its claim by the admitted value of the security, less the $100. paid for it. The bankrupt owed the petitioner the amount of the mortgage and the petitioner equitably owed the bankrupt the value of the security in his possession.

Under these circumstances, Section 68 (a) of the Bankruptcy Act applied. This section is as follows:

> "In all case of mutual debts or mutual credits between the estate of a bankrupt and the creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid."

The cases cited by the petitioner do not apply to the instant case. We are not dealing in this case with a situation involving *secured creditors.* Respondent contends that the petitioner has received payment of its claim to the extent of $9,000. and that the claim must be reduced by that sum. This conclusion is fully justified from a reading of the cases cited herein.

CONCLUSION.

The Circuit Court of Appeals for the Third Circuit, as well as the United States District Court, rendered an eminently fair and just decision. There appears to be no conflict of decisions and no reason for granting the writ, the instant petition fails to present any questions of general importance or any constitutional questions of wide general interest. The petition should be denied.

Respectfully submitted,

CHARLES E. HENDRICKSON,
Attorney for Respondent.

SAUL NEMSER,
Counsel for Respondent.

CHARLES E. HENDRICKSON,
SYDNEY L. JACOBS,
On the Brief.